BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

THOMAS L. MORRIS	)	
Claimant	)	
VS.	)	
	)	Docket No. 213,651
RUBBERMAID SPECIALTY PRODUCTS	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant appealed the Award dated January 21, 1998, entered by Administrative Law Judge Jon L. Frobish. The Appeals Board heard oral argument in Wichita, Kansas, on August 14, 1998.

APPEARANCES

Steven R. Wilson of Wichita, Kansas, appeared for the claimant. Roger E. McClellan of Wichita, Kansas, appeared for David S. Wooding, attorney for the respondent.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. The videotape, however, which is Exhibit No. 3 to the November 11, 1997, deposition of Karen Crist Terrill and which is purported to depict the jobs claimant performed for respondent, was not considered by the Appeals Board for the reasons stated below.

The ALJ's Award is silent as to claimant's entitlement to temporary total disability and temporary total disability was not made an issue before the Board. At the regular hearing before the ALJ, however, respondent announced it had paid a total of $13,234.91 in temporary total disability compensation at different weekly rates.

Although the January 21, 1998 Award lists nature and extent of disability as the only issue and it does not award any temporary total disability benefits nor contain any mention of respondent's temporary total disability payments, the parties subsequently entered into a written stipulation dated September 9, 1998 to the effect that claimant is entitled to 54 weeks of temporary total disability at the rate of $246.16 per week for a total of $13,292.64.

ISSUES

The compensability of this claim was not an issue. The ALJ limited claimant's permanent partial disability award to the stipulated percentage of functional impairment because claimant was terminated from his job with respondent for a rule violation. During oral argument the claimant announced that his claim for interest on the functional disability award from the date of the stipulation had been resolved by the parties. Therefore, the only issues for Appeals Board review are the nature and extent of claimant's disability, specifically whether claimant is entitled to a work disability, and the admissibility of the videotape.

FINDINGS OF FACT

(1) When claimant reported to work on March 31, 1996, he advised his supervisor that he was sick, but did not ask to go home. Later that night claimant was found sleeping on the job. Claimant said he was sick and had passed out. Claimant's supervisor asked him if he wanted to go home, which he did.

(2) Sleeping on the job was a violation of company rules and claimant was given a written reprimand. Claimant subsequently provided respondent with a note from his physician evidencing his illness.

(3) Claimant worked all of his next scheduled work days on April 2 and 3, 1996.

(4) On April 6, 1996, claimant suffered an injury to his back while putting lids on a pallet. He was sent to the emergency room initially and then Dr. Winblad was authorized to provide care. Claimant was taken off work until April 15, 1996, when he was released to return to work with restrictions of no lifting over 10 pounds, no bending, no twisting, and had to be able to sit on a regular basis.

(5) When claimant reported to work on April 15, 1996, he presented the respondent's company nurse with his restrictions and was told that respondent could not accommodate those restrictions.

(6) Claimant was then sent to respondent's employment manager, Janice Marr, who informed claimant he was being terminated for sleeping on the job.

(7) Thereafter, claimant received authorized medical treatment from Dr. Jacob Amrani, Dr. Stein, and Dr. Lawrence R. Blaty.

(8) After Dr. Blaty determined claimant had reached maximum medical improvement, he ordered a functional capacity evaluation and released claimant with a rating and restrictions. Claimant took those restrictions to his employer and offered to work within those restrictions but was refused due to his termination. Respondent now contends that

it could have and would have accommodated those restrictions were it not for claimant's termination.

(9) Since receiving his final restrictions from Dr. Blaty, claimant has made a good faith attempt to find appropriate employment. He eventually went to work at Winfield Country Club earning $5.15 per hour as a full-time employee averaging one to two hours a week overtime.

(10) Claimant was sent by his attorney to Dr. Pedro A. Murati for an evaluation. Dr. Murati issued a rating and adopted the restrictions of Dr. Blaty. But, because of claimant's history of working in the corrections area, Dr. Murati added the restriction to avoid contact with violent people or potentially violent people.

(11) Claimant was interviewed by vocational expert Jerry Hardin. A job tasks list was prepared. Dr. Murati essentially adopted the tasks loss report prepared by claimant and Mr. Hardin, and opined that of the 36 tasks identified there were probably 18 tasks that claimant could no longer perform. This would result in a tasks loss of approximately 50 percent.

(12) Another vocational expert, Karen Terrill, prepared a job tasks list. She believed that claimant retained the ability to perform 45 out of the 50 tasks she identified. She purported to have used both Dr. Blaty's and Dr. Murati's restrictions. It appears, however, that she used only the weight limitations and not the restriction to only occasionally bend or twist with his lower back, recommended by both Dr. Blaty and Dr. Murati, and she also did not consider the restrictions against frequent stooping and to avoid contact with potentially violent people as recommended by Dr. Murati. Dr. Amrani agreed with the tasks loss opinion contained in Ms. Terrill's report using only the weight restrictions of Dr. Blaty.

CONCLUSIONS OF LAW

The Appeals Board will first address the question of whether claimant is precluded from receiving a work disability because he was terminated from his employment with respondent for a violation of company rules or policies. The Kansas Workers Compensation Act is designed to assist the injured worker and to balance the rights of the employee and the employer and to bring them into compliance with the Act.[1] Because his is an unscheduled injury, claimant's disability is controlled by K.S.A. 44-510e(a) which provides in pertinent part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between

[1] Miner v. M. Bruenger & Co., 17 Kan. App. 2d 185, 193, 836 P.2d 19 (1992).

> the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.

The rule established in Foulk[2] provides that the legislative intent of the Workers Compensation Act is not to allow a worker to choose not to work a comparable wage job and still receive compensation when the worker is capable of earning a comparable wage. The Court of Appeals held that when an employee refuses to take a job which would allow the employee to earn a comparable wage, and which does not violate the employee's restrictions, such employee is not entitled to receive a work disability. In Foulk, the claimant refused to accept an offer of accommodated employment. The public policy considerations announced in Foulk have been held to be applicable to situations where a claimant is terminated for wilful misconduct or deliberately poor job performance.[3] Furthermore, although Foulk dealt with a prior version of K.S.A. 44-510e(a), the general principles established under Foulk were held to apply to a case under the current version of that statute.[4] In some cases the application of Foulk has been likened to a good faith test.[5]

Respondent cites the Appeals Board's decision in Acklin. In that case, claimant was terminated from a job he remained physically able to do because of poor job performance and because he left work early without permission. In distinguishing that fact situation from Lee v. Boeing[6], the Board said:

> . . . termination for cause often differs materially from economic layoff. These relate very differently to the central question of claimant's "ability". An employee laid off does not have the "ability" to perform the job from which he/she was laid off. As the presumption found in K.S.A. 44-510e itself implies, the term "ability" refers to more than physical ability, it also refers to practical economic realities. The Appeals Board has therefore considered an economic layoff to reopen questions about claimant's ability to perform other work and ability to earn a comparable wage, i.e., work disability.

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[2] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[3] Acklin v. Woodson County, Docket No. 147,322 (May 1995).

[4] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 319, 944 P.2d 179 (1997).

[5] Guerrero v. Dold Foods, Inc., 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

[6] Lee v. Boeing Co., 21 Kan. App. 2d 365, 899 P.2d 516 (1995).

> An employee terminated for poor job performance unrelated to the injury may, on the other hand, reasonably be considered to have the "ability" to perform the job. The job loss may result from matters within the employee's control. The Kansas Court of Appeals recently ruled employees who refuse to accept reasonable employment are not entitled to benefit from the refusal by an award of work disability. [citing Foulk] Employees terminated for misconduct or poor performance invoke similar policy considerations.

Although Acklin applied an earlier version of K.S.A. 44-510e, the rationale remains sound. The facts in this case, however, are readily distinguishable from Acklin. First, in the case at bar claimant's restrictions were never accommodated. He was not returned to work following his accident. Second, claimant was terminated based upon events that occurred before his accident. It cannot be said, therefore, that claimant was attempting to manipulate the workers compensation system which was the situation found to have existed in Foulk. Also, the claimant in Foulk was offered an accommodated job which was refused. Here, as we have said, respondent never offered claimant an accommodated job.

The Appeals Board has previously held that termination for misconduct that occurred prior to the work-related injury will be treated differently than misconduct that occurs post-injury.[7] Under the facts of this case, the Board concludes claimant is entitled to a work disability. The fact claimant was terminated because he fell asleep at work several days before his work-related injury does not preclude a work disability award.

Respondent argues claimant would be able to return to his pre-injury job without accommodation and therefore has no wage loss and, likewise, no work disability. The Appeals Board disagrees. First, respondent could not, after the injury, accommodate the restrictions claimant was initially given. And, although it appears respondent may have been able to accommodate claimant's subsequent permanent restrictions, respondent was not willing to do so. Second, the Board concludes claimant could not have performed all of his regular job tasks within the restrictions he was given by Dr. Blaty.

Claimant seeks a 41 percent wage loss based upon his stipulated average weekly wage of $369.24 as compared to his post-injury earnings at Winfield Country Club of approximately $217.59 per week.[8] The Appeals Board agrees with this approach which utilizes claimant's actual post-injury earnings. This is also the best evidence of claimant's wage earning ability post-accident. Although the present version of K.S.A. 44-510e does not speak in terms of ability, the appellate courts have sometimes returned to this test where there is the appearance of misconduct and here claimant voluntarily quit the Winfield Country Club job for reasons unrelated to his injury. Again, the goal has been to avoid the

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[7] Figueroa v. Excel Corporation, Docket No. 211,777 (June 1998); Ramirez v. Excel Corporation, Docket No. 198,826 (January 1998); and Armstrong v. IBP, Inc., Docket No. 179,373 (August 1996).

[8] Post accident average weekly earnings at Winfield Country Club were arrived at by multiplying claimant's hourly rate of $5.15 times 40 hours plus 1.5 hours of overtime at time-and-a-half or $7.73 per hour.

potential of manipulation inherent in claimant's post-injury conduct. Whereas the potential for manipulation does not exist where the termination was for pre-injury conduct, the same cannot always be said for post-injury earnings. Nevertheless, in this case the Appeals Board does not find that claimant has attempted to manipulate the workers compensation system or failed to act in good faith to secure appropriate employment post-injury.

Based upon a tasks loss of 50 percent and a wage loss of 41 percent, the Appeals Board finds claimant is entitled to a 45.5 percent work disability.

Respondent attempted to introduce a videotape through the testimony of Ms. Terrill. Claimant objected due to hearsay and because there was inadequate foundation to establish that the jobs depicted on the videotape included the same job claimant was performing for respondent when he was injured and/or accurately depicted any of the several other different jobs claimant had performed for respondent. The Appeals Board agrees the videotape is unreliable, lacks adequate foundation, and should not be considered. There is no testimony from claimant or any of respondent's employees confirming the accuracy of the videotape or as to how the job tasks it depicts relate to the jobs claimant performed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish dated January 21, 1998, should be, and is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Thomas L. Morris, and against the respondent, Rubbermaid Specialty Products, a qualified self-insured, for an accidental injury which occurred April 6, 1996, and based upon an average weekly wage of $369.24 for 54 weeks of temporary total disability compensation at the rate of $246.16 per week or $13,292.64, followed by 171.08 weeks at the rate of $246.16 per week or $42,113.05, for a 45.5% permanent partial general disability, making a total award of $55,405.69.

As of September 10, 1998, there is due and owing claimant 54 weeks of temporary total disability compensation at the rate of $246.16 per week or $13,292.64, followed by 72.71 weeks of permanent partial compensation at the rate of $246.16 per week in the sum of $17,898.29 for a total of $31,190.93, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $24,214.76 is to be paid for 98.37 weeks at the rate of $246.16 per week, until fully paid or further order of the Director.

Future medical benefits may be awarded upon proper application to and approval by the Director.

Unauthorized medical expense up to $500 is ordered paid to or on behalf of the claimant upon presentation of an itemized statement verifying same.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Barber & Associates	
Deposition of Lawrence Richard Blaty, M.D.	$132.80
Transcript of regular hearing	249.70
Deposition of Karen Crist Terrill	145.80
Deposition of Janice Marr	192.40
Deposition of Jacob Amrani, M.D.	121.40
Deposition of Steven McNinch	128.40
Alexander Reporting Co.	
Deposition of Pedro A. Murati, M.D.	161.43

IT IS SO ORDERED.

Dated this ____ day of September 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steven R. Wilson, Wichita, KS
David S. Wooding, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director